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BEFORE THE

SURFACE TRANSPORTATION BOARD

Ex Parte No. 646 (Sub-No. 1)

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

Joint Written Supplemental Comments

submitted by

American Chemistry Council, American Forest and Paper Association, American Soybean Association, Agricultural Retailers Association, Colorado Wheat Administrative Committee, Corn Refiners Association, The Fertilizer Institute, Glass Producers Transportation Council, Idaho Barley Commission, Idaho Wheat Commission, Institute of Scrap Recycling Industries, Iowa Soybean Association, Montana Wheat and Barley Committee, National Association of Wheat Growers, National Barley Growers Association, National Corn Growers Association, National Council of Farmers Cooperatives, National Farmers Union, National Grain and Feed Association, National Sorghum Producers, The National Industrial Transportation League, National Oilseed Processors Association, National Petrochemical & Refiners Association, Nebraska Wheat Board, North American Millers Association, North Dakota Grain Dealers Association, North Dakota Public Service Commission, North Dakota Wheat Commission, Oklahoma Wheat Commission, Paper and Forest Industry Transportation Committee, PPL EnergyPlus, LLC, South Dakota Wheat Commission, Texas Wheat Producers Board, USA Rice Federation, Washington Wheat Commission, Alliance for Rail Competition, Consumers United for Rail Equity
and
The Honorable Brian Schweitzer, Governor, State of Montana

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TABLE OF CONTENTS

PAGE

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The Interested Parties

The parties listed on the front cover ("Interested Parties") respectfully submit these Joint Written Supplemental Comments ("Supplemental Comments") in response to the Board's decision in this proceeding served on January 22, 2007 ("*January Decision*") to leave the record in this proceeding open until February 26, 2007 "to allow parties the opportunity to submit supplemental comments on issues raised in this notice and at the hearing" that was conducted on January 31, 2007. The Interested Parties welcome this opportunity to provide their views as to the issues in the Board's *January Decision* and other issues raised at the hearing.

At the opening of the hearing, all three members of the Board noted the importance of the question of access to the Board's small-case procedures. Chairman Nottingham stated that the purpose of the proceeding was to bring "certainty to the question of who has access." Vice-Chairman Buttrey declared that he was "very concerned about shippers having access." And Commissioner Mulvey noted that shippers "were still without meaningful access" to the Board's small-case procedures. These and other comments made by Board members at the January 31

hearing indicate that the Board has recognized that the current small case rules do not effectively comport with Congress' order "to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case."

The Interested Parties *strongly* agree with the Board that the question of access to the Board's small rate case procedures is absolutely central to this case. And, for that reason, the Interested Parties are most concerned about the proposals that the Board set forth in its July 28, 2006 decision in this case ("*July Decision*"), since they believe that a number of the elements of that decision would *restrict* the access of shippers to the Board's small case procedures, either directly by seriously confining shippers' eligibility to use small case procedures, or indirectly by making the entire process too long, too complicated, and too expensive.

Although the Interested Parties have pointed to many serious flaws in the Board's newly proposed rules, we nevertheless believe that some of the Board's approaches represent steps in the right direction, especially if adjusted as we have proposed and further propose herein. Moreover, the Interested Parties are heartened by the direction of a number of aspects of the Board's *January Decision* because the Board appears to have begun to recognize some of the problems with the proposals in its *July Decision*. Nevertheless, the Interested Parties strongly believe that the Board needs to go much farther than the changes suggested in its *January Decision* in order to provide for truly effective access to small rate case procedures. As set forth further in these Supplemental Comments, the Interested Parties believe that much of the testimony at the hearing both confirmed the points and serious concerns that had been raised by the Interested Parties in their three rounds of Comments in this proceeding, and pointed the way

to the changes necessary to provide for truly effective access to truly simplified and expedited small case procedures.

These Supplemental Comments are in six parts. Part I is an Executive Summary. Part II deals with several broad legal issues that were raised either in the *January Decision* or at the hearing. Part III deals with the question of eligibility, including the "small claims" or "limit to relief" approach discussed in the Board's *January Decision*. Part IV discusses various questions involving the Board's Simplified Stand-Alone Cost ("Simplified-SAC") proposal that were raised in the *January Decision* and at the hearing. Part V discusses issues related to the Three-Benchmark approach discussed in the *January Decision* or at the hearing. Finally, Part VI briefly discusses the issue of mandatory mediation.

I. EXECUTIVE SUMMARY

Broad legal issues raised in the Board's *January Decision* or at the January 31st hearing were: (a) the legality of the Board's Three-Tier approach; and (b) the suggestion by the Association of American Railroads that the key issue in this proceeding is how much of the railroads' traffic should be "exposed" to treatment under small case procedures. With respect to these issues, the Interested Parties believe that the Three-Tier approach does not satisfy the statutory scheme, since the statute provides an alternative to Full-SAC and not to other methodologies. The Union Pacific suggestion to simply eliminate the Three-Benchmark approach and offer only Simplified-SAC as the response to Section 10701(d)(3) is unacceptable, since, among other reasons, the Board's proposed Simplified-SAC procedure is neither "simplified" nor "expedited" as the statute requires.

The Interested Parties believe that the Board was correct in its *July Decision* in unanimously rejecting a railroad argument that eligibility in small cases should be measured by

the shipper's size. The statutory command in Section 10701(d)(3) is directed to the value of the *case* and not the size of the shipper.

Finally, the Interested Parties believe that the AAR's focus on the amount of traffic eligible for small case treatment is inconsistent with the statute. The statute dictates, in unequivocal language, that *all* regulated traffic for which a Full-SAC case is "too costly" must be judged under the simplified and expedited procedures.

With respect to the question of eligibility raised in the Board's *January Decision* and at the hearing, the Interested Parties believe that the agency's "small claims" or "limit to relief" approach may be a useful approach to eligibility, provided that certain conditions are met. Specifically, the "limit to relief" approach must be based on a realistic estimate of litigation costs; must include a realistic risk factor; must eliminate the aggregation rule; and must permit the shipper to revise its election if more information becomes available. The Interested Parties believe that a realistic estimate of Full-SAC litigation costs is $4.5 million, and a realistic estimate of Simplified-SAC litigation costs (assuming that the Board goes forward with its Simplified-SAC proposal) is $3.5 million. A reasonable risk factor is three times the litigation costs. Thus, a "limit to relief" approach should cap the Three-Benchmark relief at $10.5 million *and cap Simplified-SAC relief at $13.5 million.*

However, the Interested Parties continue to believe that the Board's Simplified-SAC proposal should be withdrawn. The reasonableness of the Board's Simplified-SAC process depends in part upon how much quality is sacrificed for how much saving in cost. Without thorough testing, the Board cannot show that the purported trade-offs are justified. The Board should test the Simplified-SAC procedure against the results of a Full-SAC analysis, and should also test the Simplified-SAC procedure to determine that the process is "simplified" and

"expedited" as required by the statute. If the Board determines to go forward with the Simplified-SAC process, it should not preclude an analysis based upon a different routing of the issue traffic.

The Interested Parties believe that the Three-Benchmark approach is economically and legally defensible and should be preserved. However, certain changes should be made. The Board should consider other factors in addition to the adjusted R/VCcomp calculation proposed in the Board's *July Decision* as warranted by individual circumstances, so long as the Three-Benchmark process remains simplified and expedited. The Interested Parties do not believe that "ratcheting" is a concern under the Three-Benchmark approach, especially if the Board considers factors in addition to the adjusted R/VCcomp calculation as advocated by the Interested Parties.

The Interested Parties believe that equal access to the unmasked Waybill Sample is necessary under the Three-Benchmark approach. These parties also believe that the Board is completely correct in revising the RSAM and R/VC>180 calculation as it has proposed in its *July Decision* for use in the adjusted R/VCcomp calculation, though it should continue to publish the current figures as well. The Interested Parties strongly believe that traffic other than that of the defendant railroad should not be automatically excluded from the Three-Benchmark comparison group, and that contract traffic should continue to be included in that group as well. The Interested Parties support the Board's proposal to use unadjusted URCS, and the Board should strongly resist efforts to make *ad hoc* adjustments when calculating variable costs for use in the adjusted R/VC comp calculation.

Finally, the Interested Parties support the use of mandatory mediation, as long as the mediation period is short.

II. INTERESTED PARTIES' COMMENTS ON THE LEGAL ISSUES DISCUSSED IN THE BOARD'S JANUARY 22 DECISION AND AT THE HEARING.

There were three broad legal issues raised in the Board's *January Decision* or at the January 31st hearing. These issues involved: (a) the legality of the Board's "Three-Tier" approach; (b) the suggestion raised by Vice-Chairman Buttrey that the focus of the Board's rules should be on "small shippers" rather than "small cases"; and, (c) the suggestion by the Association of American Railroads ("AAR") that the key issue in the proceeding is how much of the railroad's traffic should be "exposed" to treatment under the small case procedures. Each of these issues is discussed below.

A. Legality of the Three Tier Approach

In the *January Decision*, the Board acknowledged that the statute directs the agency to create a procedure for determining the reasonableness of challenged rail rates in those cases in which a "full stand-alone cost presentation" is too costly, given the value of the case. The Board than noted that UP's contention that the proposed Simplified-SAC procedure would satisfy this directive, and the Board asked the parties to address this issue.

The Interested Parties believe that the three-tier system devised by the Board does not satisfy the statutory scheme for regulation of rail rates. The statute contemplates two types of rate challenges: a full Stand-Alone Cost ("Full-SAC") case, and a "simplified and expedited" case. The "simplified and expedited" process is to be available *whenever* a Full-SAC proceeding would be "too costly, given the value of the case." The three-tier system that has been proposed by the Board does not fit that mold.

The three tiers proposed by the Board are to be separated by two value levels. Cases that will produce more than $3.5 million in benefits to the complaining shipper over five years are to be brought solely under the Full-SAC rules because the Board has determined that a Full-SAC

case can be maintained by a shipper for no more than that amount.[1] Cases producing a benefit to the complaining shipper of $200,000 or more over five years are eligible for a Simplified-SAC process because the Board has determined that a Simplified-SAC case will cost no more than $200,000 to maintain. Shippers are not eligible to use the third-tier, the Three-Benchmark process, unless the value of their case is less than $200,000.

By creating a three-tier regime with the availability of the lowest, Three-Benchmark, tier dependent on the cost of the next highest tier, the Simplified-SAC process, the Board is violating Section 10701(d)(3), which directs that a simplified and expedited method be available whenever a "full stand-alone" presentation is "too costly." The Board's rationale instead is that, by devising an intermediate tier, the Board can withhold availability of the Three-Benchmark process even when a Full-SAC case clearly would be too costly for the value of the Three-Benchmark case. That is an erroneous interpretation of the statute. The availability of any "simplified and expedited" process, including the Three-Benchmark method, must be determined by the cost of a Full-SAC case and not by the cost of any other "simplified" case.

Union Pacific Railroad Company ("UP") would have the Board resolve this flaw by simply eliminating the Three-Benchmark approach and offering only Simplified-SAC as the response to Section 10701(d)(3). That, likewise, would be an unlawful response. The Board may not be barred from adopting an appropriate "Simplified-SAC" procedure, but the one that it has proposed does *not* meet the requirements of the statute.

Simplified-SAC, as proposed by the Board, is neither simplified nor expedited. The Board has proposed a timetable of 18 months to complete a Simplified-SAC proceeding. It would be the longest timetable of any rate proceeding that could be brought before the Board,

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[1] The Interested Parties strongly disagree with the Board's proposed value determinations and eligibility thresholds, an issue that is discussed in Section III herein.

under the Board's published rules.[2] Under the Board's existing rules, a Full-SAC case is scheduled to be completed in 16 months. 49 C.F.R. 1111.8 and 49 U.S.C. 10704(c)(1). The Board has proposed that Three-Benchmark cases be completed in nine months. It is not possible to conclude that the Simplified-SAC process proposed by the Board is "expedited" within the meaning of the statute.[3]

Moreover, given the complexity of the Board's Simplified-SAC process, the Board cannot cut substantial time from the proposed Simplified-SAC schedule without jeopardizing the ability of the parties to have a full, fair, and meaningful process available for the presentation of their cases. It is no accident that the Board recognized the necessity for a 12-month evidentiary schedule in a Simplified-SAC case. Even with the evidentiary differences between a Full-SAC and Simplified-SAC case, the Board's "Simplified-SAC" is just not simple at all. In their Comments in this case, the Interested Parties have discussed in detail the complexities of a Simplified-SAC case. See Interested Parties Opening Comments, pp. 19-28, Crowley V.S. pp. 22-25 and Fauth V.S., pp. 10-14 ; Reply Comments, pp. 12-17 ; Rebuttal Comments, pp. 8-13 and Fauth Rebuttal V.S., pp. 4-10. Moreover, at the hearing and in this pleading, the Interested Parties note that the adjustments stemming from Ex Parte No. 657 are not likely to appreciably reduce the time, the cost, or the overall complexity of a Simplified-SAC case.

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[2] Interestingly, after the hearing, the Department of Transportation submitted to the Board a description of one area in which DOT adjudicates the reasonableness of certain rates and charges, specifically those levied upon air carriers by airports. See letter of Paul Samuel Smith to Vernon A. Williams, February 7, 2007. The statute under which DOT operates in those cases gives the agency only 120 days to resolve the dispute.

[3] One or two of the railroads suggested at the January 31 hearing that the Simplified-SAC procedural schedule can be shortened by eliminating the filing of rebuttal evidence. Even assuming that suggestion were otherwise appropriate and lawful, rebuttal evidence accounts for only 30 of the 360 days before the record is closed in a Simplified-SAC case. Moreover, a number of carriers have asked the Board to insert additional time in the schedule in order to develop the information required in the Second Disclosure. See, NS/CSXT Opening Comments, p. 10; CPR Opening Comments, p. 16; BNSF Opening Comments, p. 35. In a Full-SAC case, seven months is provided in the Board's rules for completion of the evidentiary record, compared with 12 months proposed for the Simplified-SAC process.

Simplified-SAC cannot replace the Three-Benchmark test for another reason as well. If the Board were to adopt UP's suggestion, it is clear that *no rate relief whatsoever* would be available as a practical matter for a very large number of shipments. As discussed further below, the great weight of the evidence of record addressing the costs of maintaining a Simplified-SAC case suggests that a Simplified-SAC case will cost up to $3.5 million *before* adding a required risk factor. Depending on the assumptions made regarding a per-car rate reduction that might flow from such a case, it is simple to see that many smaller shipping volumes will be priced out of access to Board review by the cost of the case. For example, if a Simplified-SAC case costs $3.5 million and results in a rate reduction of $500 per car, 7,000 cars would have to benefit from the rate reduction just to recover the direct cost of the case. There will be a great many origin-destination pairs failing to generate that much traffic over a five-year span, and many shippers will not even gamble on the fact that their traffic levels between a given origin and destination pair will remain high enough for five years to recover the significant cost of a Simplified-SAC case. Thus, adoption of Union Pacific's suggestion would *eliminate* any possibility of relief to large numbers of shippers, instead of providing *access* to the Board's procedures as discussed by the members of the Board at the hearing.

In short, the Simplified-SAC procedure as defined by the Board does not satisfy Section 10701(d)(3). The Three-Benchmark approach is the only "simplified and expedited" process that has been proposed by the Board that meets the requirements of the statute. Its availability should not, and may not in the opinion of the Interested Parties, be limited to those circumstances when "all reasonable means of simplifying a SAC presentation" have been exhausted, as suggested in the Board's *January Decision.* See, *January Decision,* p. 5.

B. "Small Shippers" Versus "Small Cases"

Toward the close of the January 31 hearing, Vice Chairman Buttrey commented to the effect that the Board should be pursuing simplified and expedited rate remedies only for small *shippers*. The Interested Parties are comprised of a large number of trade organizations whose members include both "large" and "small" shippers. Some of these associations comprising the Interested Parties are in fact made up predominantly of smaller shippers. Yet there is no belief among the Interested Parties that rules for "simplified and expedited" procedures should be applicable based on a shipper's size, regardless of the method that might be chosen to measure size. The Interested Parties strongly oppose, as contrary to the statute and contrary to the practical situation facing both large and small shippers, a position that the Board's procedures for non-Full-SAC cases be predicated on the size of the *shipper* rather than the size of the *case*.

The Interested Parties believed that the issue raised by Vice Chairman Buttrey had firmly and correctly been put to rest by the Board in the *July Decision*. In that Decision, the Board unanimously rejected a railroad industry argument that "eligibility in small rate cases ... should embrace only 'truly small cases,' measured by a shipper's size and annual freight bill." *July Decision*, at 35. The Board concluded that "under the statute eligibility must be based on the value of the case" and not the size of the shipper. *Id.* The Interested Parties understand and share Vice Chairman Buttrey's concern for small shippers, but are unable to agree that Congress intended the standard it crafted in Section 10701(d)(3) to be determined by a shipper's size. Neither the statute nor its legislative history contains the merest hint of any such purpose or how a "size standard" rationally could be defined.

In addition to the fact that the Congressional command in Section 10701(d)(3) is directed to the "value of the *case*" and not the size of the shipper, the Board's jurisdiction over

unreasonably high rates is *not* tied to the size of the complaining shipper but instead to a specific *traffic* movement when the Board determines "that a rail carrier has market dominance *over the transportation to which a particular rate applies*. 49 U.S.C. 10701(d)(1) (emphasis added). Thus, it is the specific transportation subject to an allegedly unreasonable rate that must determine the Board's jurisdiction, rather than the characteristics of the complaining shipper.

Even placing statutory construction aside momentarily for the sake of argument, it would be unwise and unsound to conclude that "large" shippers do not deserve access to the same statutory rights as smaller shippers. An unreasonably high railroad rate can subject a large shipper's facility to substantial economic harm. The fact that a large shipper may have other facilities does not justify harmful railroad actions against one of its facilities: the potential harm to a given facility is the same regardless of the size of the owner.

Some of the railroads testifying at the January 31 hearing suggested that shippers can control railroad behavior by threatening railroads with a loss of business. This is simply incorrect, for a variety of reasons.

At the most basic level, unless a railroad is limited to a single shipper as the originator of a certain type of traffic, a railroad is unlikely to lose that traffic even if a shipper attempts to divert some business from the carrier, because other shippers of the same commodity will fill the void and, so long as there is a capable receiver of that commodity, the railroad will continue to move the same volume of that traffic as before to meet the receiver's needs.

Moreover, the threat of potential product or geographic competition is virtually always hollow, especially in the current circumstances. First, given the concentration in the railroad industry in which there are only two significant carriers east of the Mississippi River and two west of there, it is very likely that a shipper's other facilities, or the facilities of other shippers

manufacturing and transporting similar products, are located on the lines of or must travel over the same carrier that holds the shipper's facility captive.

Second, even if a shipper's other facilities, or the facilities of another shipper, are located on the lines of a competing carrier, the agency has determined that if the carrier that is holding a monopoly over the complaining shipper's facility also holds a monopoly on *any portion* of the route of movement, that carrier will appropriate the entire monopoly rent. *Burlington Northern Inc. – Control and Merger – Santa Fe Pac. Corp.*, 10 I.C.C.2d 661, 747-57 (1985), *aff'ed sub nom. Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997). Thus, very little bulk traffic is subject to competition, since it is seldom that more than one railroad serves *both* the origin *and* the destination of that traffic. As long as either the origin or the destination is captive to a single railroad, there is no genuine possibility of competition over price.

Third, even if a shipper has some captive and some competitive traffic at a facility, the threat to divert the competitive traffic is generally futile, since the railroad can – and does -- simply raise the rates on the captive traffic to make up for any potential loss of business on the competitive traffic. It is only when competitive traffic comprises the majority of traffic from a particular facility that the threat of traffic diversion might even begin to be credible.

Finally, even if a shipper were to attempt today to threaten a railroad with traffic diversion as a deterrent against a rate increase, the Board has noted on several recent occasions that there is a shortage – not a surplus – of railroad capacity, a condition inconsistent with railroad claims of vulnerability to threats of traffic removal. Railroads today are raising rates without any fear whatsoever of losing traffic. And, in those limited instances where traffic diversion is possible, it is of little solace because railroads seldom offer rate competition to each other. Railroads readily can see that shippers who may attempt to divert traffic away from them

will face equally high rates on any other carrier that might have a competitive route, since all railroads possess capacity-constrained line segments.

Thus, as much as the Interested Parties appreciate the Vice Chairman's concerns, we cannot agree as a matter of statutory construction or practical application with a jurisdictional test predicated on shipper size.

C. The AAR's Focus on the Amount of Traffic Eligible for Small-Case Treatment is Inconsistent With the Statute

During the course of the January 31 hearing, the Association of American Railroads ("AAR") argued that the issue in this case is how much traffic the Board should "expose" to a rate reasonableness standard that does not require a Full-SAC presentation, and argued that the Board must permit rail carriers to retain revenues for infrastructure expansion. The Interested Parties vigorously disagree that the Board lawfully may substitute a policy goal of that nature for a statutory standard.

Congress clearly instructed the Board to develop a "simplified and expedited method" to resolve those rate disputes in which Full-SAC is "too costly" given the value of the case. The standard chosen by Congress reflected its recognition of the forbidding costs of a Full-SAC case. Full-SAC cases are not costly by shipper design, but because of the complex and tremendously expensive evidence necessary to meet the Board's requirements. Moreover, Congress recognized that the Board's selected standard for use in coal rate cases (i.e., those involving large traffic volumes moving repetitively between a single or very limited number of origin-destination pairs) was likely to be "too costly" for use in a large number of non-coal rate proceedings, which would usually involve many, more diverse, types of movements, to a large number of destinations. Therefore, Congress directed the Board to fashion a simplified and expedited remedy suitable in *each and every* such instance.

Full-SAC standards have been said by the Board to reflect differential pricing opportunities that the Board believes must be pursued by railroads. However, as rail capacity diminishes and as railroads rapidly approach or exceed revenue adequacy, the need to maintain wide differential pricing diminishes. *See* Rebuttal Comments of Interested Parties at 36-37, citing the Board's decision in *Coal Rate Guidelines- Nationwide,* 1 I.C.C.2d 520, 535 (1985)("*Guidelines*") ("captive shippers should not be required to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to insure a financially sound carrier").

Moreover, very high revenue to variable cost margins on captive traffic are *not* the only means -- or even the best means -- by which railroads can provide for infrastructure expansion. Although some types of infrastructure expansion are likely to have varying degrees of benefit for a cross-section of railroad customers, other infrastructure investments are tightly tailored to benefit a specific customer base, such as intermodal terminals in which many railroads currently are making significant investments. Those terminals provide a direct benefit only to those shippers who utilize the terminals for intermodal traffic. The Board recently has stated that, under its statute, "railroads are encouraged to independently price their services so as to eliminate cross-subsidies and ... allow rail carriers to recover their costs from shippers who generate them." *North America Freight Car Association, et al. v. BNSF Railway Company*, STB Docket No. 42060 (Sub-No. 1) (January 26, 2007, slip op. at 6), citing *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 127 (2d Cir. 1993)).

Congress *has* provided a way for railroads to fund service improvements tailored to specific shippers, and that is through rail transportation contracts. It has been recognized that the "benefits [from contracts] flow principally from the increased certainty inherent in contractual

agreements and the resulting ability of both shippers and carriers to better plan allocation of their resources." *Change of Policy, Railroad Contract Rates*, 361 I.C.C. 205, 206 (1979). *See also, Guidelines* at 556-58, explaining that contracts can lead to outcomes preferable to those produced by Ramsey Pricing.

In any event, the Interested Parties disagree with AAR that the Board's role is to determine the amount of traffic that must be subject to a Full-SAC standard if a rate challenge is brought. The statute makes that determination by its own terms. *All regulated traffic for which a Full-SAC case is "too costly" must be judged under the simplified and expedited procedures.* This means that *all* regulated traffic *must* have access to small-rate case procedures if litigation under a Full-SAC procedure would be "too costly" given the value of the case. The Board must cut the cloth to fit the suit, and not the other way around, as AAR would have it.

III. ELIGIBILITY FOR SMALL CASE PROCEDURES.

A significant portion of the Board's *January Decision* and much discussion at the January 31st hearing were devoted to the question of eligibility for small case relief. The Interested Parties agree that the issue of eligibility is one of the most important issues confronting the Board in this proceeding. The Interested Parties are extremely concerned that the Board's proposed eligibility standards are so far below a realistic level as to preclude, as a practical matter, any access by a large majority of shippers to small case procedures, and thus eliminate any relief for these many shippers under the statute.

In its *January Decision*, the Board proposed a "small claims" or "limit to relief" model, by which a complainant would be free to select the methodology under which it wanted the rate to be judged. However, a limit on the relief available under each method would be imposed. Thus, rather than trying to prejudge the merits of a particular case and calculate the actual value

of a case, under the "limit to relief" model, the Board could rely on the shipper to make that assessment.

At the hearing, the Interested Parties indicated that they were not opposed to exploring the Board's suggestion as a possible useful approach. After having considered this matter further, the Interested Parties believe that the "small claims" or "limit to relief" model does have merit, *provided that* certain conditions are met. This matter is discussed in detail below

A. The STB's "Small Claims" or "Limit to Relief" Approach May Be a Useful Approach to Eligibility, Provided That Certain Conditions Are Met.

Under the "small claims" or "limit to relief" model, the complaining shipper could make an assessment of the merits of its particular case (assuming that the shipper has access to required information, discussed below) and choose a method to challenge a rate based in part on that assessment. The "limit to relief" model also avoids the problem of the Board's attempting to estimate the actual value (as distinct from the maximum value) of the case, and provides more flexibility to the shipper-complainant as the complaint process unfolds.

However, in order for the "limit to relief" model to work, certain conditions must be met to ensure compliance with the statute. As noted below, the "limit to relief" model must: (1) be based on a realistic estimate of litigation costs; (2) include a realistic risk factor; (3) eliminate the aggregation rule; and, (4) provide a shipper access to needed information in order to make an informed decision and permit the complainant to revise its election if more information becomes available. The Interested Parties note that, at the hearing, counsel for the AAR also noted that the fairness of the "limit to relief" proposal depended upon the eligibility limits chosen by the Board.

1. The "Limit to Relief" Approach Must Be Based on a Correct Estimate of Litigation Costs.

One of the key inputs to the Board's proposed "limit to relief" approach is the cost of litigating a Full-SAC case and (assuming for the sake of argument that the Board maintains its Simplified-SAC procedure as part of a Three-Tier approach) the cost of litigating a Simplified-SAC case. If the dictates of Section 10701(d)(3) are to be followed, the limits to the relief available in a Full-SAC, Simplified-SAC and Three-Benchmark case must be based on a *realistic* cost of litigating Full-SAC and Simplified-SAC case (with Three-Benchmark relief available for all of the cases for which Full-SAC or Simplified SAC would be too costly).[4] Otherwise, the Board would *not* be "establishing a simplified and expedited method" of determining the reasonableness of a challenged rate given the "value of" the small case compared to the cost of a Full-SAC or Simplified SAC case.

a. The evidence shows that a realistic cost for a shipper to litigate a Full-SAC case is $4.5 million

In its *July Decision*, the Board asked whether it had "overestimated" the reasonable, expected costs to litigate a Full-SAC case in light of the changes adopted in Ex Parte No. 657 (Sub-No. 1). Evidence adduced at the hearing clearly indicated that the Board had *not* overestimated the costs of litigating a Full-SAC case, but in fact the Board's $3.5 million estimate was *understated*.

The huge weight of the evidence in this proceeding, including the evidence adduced at the hearing, indicates that the realistic cost of a Full-SAC case is $4.5 million. In their Opening Comments, the Interested Parties submitted the testimony of witness Crowley, who has participated in numerous Full-SAC cases since the procedure was implemented by the Interstate Commerce Commission in 1985. Witness Crowley testified both in his Verified Statement and

[4] *It must also be based on a realistic litigation risk factor (discussed in the next section).*

at the hearing that a $4.5 million number for the cost of litigating a Full-SAC case is realistic. Interested Parties' Opening Comments, V.S. Crowley, p. 23. At the hearing, counsel for the Interested Parties informed the Board that Otter Tail Power Company, the complainant in the most recent Full-SAC proceeding, had authorized him to tell the Board that Otter Tail's litigation cost before the Board in that case totaled $4.5 million.

Moreover, testimony by railroad witnesses at the hearing confirmed the accuracy of the $4.5 million figure submitted by the Interested Parties. Richard Weicher, counsel for BNSF, indicated at the hearing that BNSF spent a "lot more" litigating the Otter Tail case than the Board's $3.5 million Full-SAC estimate stated in the *July Decision*.[5] Ms. Louise A. Rinn, counsel for Union Pacific Railroad Company, indicated at the hearing that the UP had spent $3.5 million in litigating the *Wisconsin Power and Light* case. *Wisconsin Power and Light Company v. Union Pacific Railroad Company,* 5 S.T.B. 955 (2001). It should be noted that opening evidence was filed in that case in June 2000 and the record closed in January 2001 – more than seven years ago. Even calculating *just* the effects of inflation over the intervening seven years, without accounting for the huge increase in the cost of litigating a Full-SAC case based upon the more stringent evidence now required under Board precedent, it is clear that UP's "current cost" of litigating the *WP&L* case today would be at least $4.5 million, and probably much, much more.

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[5] At the hearing, BNSF argued that the Otter Tail case required extra expenditures because Otter Tail changed its SAC model numerous times. The charge is nonsense. As the Board well knows, there were three rounds of supplemental evidence in the case. The first round was due to the changed evidentiary standard adopted by the Board in the *Duke Power* case, in which the Board rejected any use of market-based divisions and required the use of the Modified Straight-Mileage Prorate ("MSP") method. The written evidence submitted by Otter Tail was just 25 pages long. The second submission was requested by BNSF, and Otter Tail's reply totaled approximately 60 pages. Finally, the third submission was requested by the Board itself, directing the parties to file certain supplemental evidence, and Otter Tail's total written evidence was less than 70 pages. Otter Tail's supplemental written filings totaled only about 150 pages, a small portion of the literally thousands of pages of written testimony in total in the case. It is clear that the supplemental filings did not appreciably add to the cost of the case, and in any event were *not* the responsibility of Otter Tail.

Moreover, the evidence adduced at the hearing clearly indicated that the changes made as a result of the Board's Ex Parte 657 decision would *not* appreciably affect the costs of litigating a Full-SAC case, *especially* if that Full-SAC case involved a non-coal movement.

Specifically, at the hearing, Mr. Crowley testified that several of the Board's new Ex Parte 657 procedures are likely to *increase*, rather than decrease, the cost of bringing a Full-SAC case. Mr. Crowley noted that in its Ex Parte 657 decision, the Board substituted the Average Total Cost ("ATC") approach in place of the MSP method for allocating cross-over revenues. The MSP methodology in general simply required the parties to calculate the total revenues from cross-over traffic, and allocate a portion of those revenues based upon the mileage that the cross-over traffic traveled on the Stand-Alone Railroad ("SARR") – an easy calculation. Mr. Crowley noted that, in contrast, the ATC approach requires the *calculation of the on-SARR and off-SARR variable cost of transporting each and every movement in the traffic universe*, and allocating the incumbent's fixed costs based on a density-adjusted allocation. This procedure adds a tremendous amount of complexity to the revenue allocation process, even in a coal case (where the cross-over movements number usually 200 movements or less). The complexities are expected to increase significantly in a non-coal case, in which there may be thousands or even hundreds of thousands of cross-over movements.

Mr. Crowley also testified that that the second item changed in Ex Parte 657, use of the Maximum Markup Method ("MMM") to determine the maximum reasonable rate in place of the Percent Reduction Method, will also add to the complexity and cost of a Full-SAC case. Although the Percent Reduction Method only required the calculation of SAC and aggregate SAC revenues to develop the maximum reasonable rate, the MMM requires a much more complex evaluation of the rate of every movement in the SAC system.

Finally, although the Board's elimination of movement-specific variable costs in its Ex Parte 657 procedures will lower the cost of preparing a SAC case, Mr. Crowley testified that the impact of this change will not be as much as the Board presumes. The litigation of variable costs in recent SAC proceedings has *not* been a major factor in the litigation, since the challenged rates have been far above the jurisdictional threshold and the maximum rate developed by the Board has been far above the jurisdictional threshold. In the Otter Tail case, for example, the defendant *conceded* that the rate exceeded the jurisdictional threshold. The variable cost evidence submitted by the complainant in the case was short and confined to just five issues: road property return and depreciation, locomotive maintenance, locomotive capital costs, maintenance of way costs, and crew costs. The minimal importance of the variable cost issue in the case is graphically shown by the fact that the Board's ruling in the case devoted a *single paragraph* in a 110-page written decision to the variable cost evidence. Clearly, the use of system-average variable cost in future Full-SAC cases will not counterbalance the increases in the cost of litigating SAC cases as a result of the other Ex Parte 657 changes.

Moreover, the testimony by railroad witnesses at the hearing also supported the evidence submitted by the Interested Parties that the changes made by the Board's Ex Parte 657 decision were not likely to affect the cost of litigating a Full-SAC case appreciably. Mr. Terence Hines, counsel for Canadian Pacific, declared that he "tend[ed] to agree" that Ex Parte 657 "will not save a lot of money." And BNSF counsel Weicher said that "it remains to be seen" whether the cost of litigating a SAC case will come down in response to the Ex Parte 657 changes.

Finally, the Board should take note of the fact that the cost of litigating a Full-SAC case has been increasing at astronomical rates over the past several years. In its 1995 decision in *Rate Guidelines – Non-Coal Proceedings*, Ex Parte 347 (Sub-No. 2), slip op. at 4 n. 2, served

December 1, 1995, the ICC estimated that estimates for presenting a SAC analysis ranged at that time from $250,000 to $1,000,000. Thus, in just eleven years, the cost of litigating a Full-SAC case has nearly *quintupled* if the high end of the ICC's 1995 estimate is credited, and has increased *eighteen* times if the low end of the 1995 estimate is used. Taking the midpoint of the ICC's estimate of a cost of a SAC case in 1995, the cost of a SAC case today ($4.5 million) has increased over *seven* times in just eleven years. In light of this history, the Ex Parte 657 changes wrought by the Board may slow the rate of increase, or at the very best, prevent further increases in the current $4.5 million cost of litigating a Full-SAC case. Thus, it would be arbitrary and without substantial evidence for the Board to predict that the cost of litigating a Full-SAC case will decrease, and to base its eligibility standards for medium and large cases on such an expected decrease.

b. The evidence shows that a realistic cost for a shipper to litigate a Simplified-SAC case is $3.5 million

It is obviously not possible to know for sure how much a Simplified-SAC case will cost, since no one has any experience with the proposed procedure. Indeed, the *very uncertainty* of the question suggests strongly that the Board should err on the "high side" when evaluating the likely cost of a Simplified-SAC case. The huge run-up in the cost of litigating Full-SAC cases over the past eleven years suggests that the Board should be very cautious in projecting large litigation cost savings. The fact of the matter is that the cost of litigation before the Board has tended to be much more expensive than the Board has believed it to be.

The evidence in this case and the evidence adduced at the hearing indicate that the cost of litigating a Simplified-SAC case will be many, many times the $200,000 projected by the Board in its *July Decision*. Witnesses Crowley and Fauth submitted Verified Statements on this point, and Witness Fauth submitted a detailed analysis of the work elements that would be required.

Both Mr. Crowley and Mr. Fauth testified at the hearing that the economic consulting cost alone of a Simplified-SAC case would be many times higher than the $200,000 figure presented by the Board.

At the most basic level, as noted above, testimony at the hearing showed clearly that the starting point for the Board's assumption – that a Full-SAC case would cost $3.5 million, was inaccurate. That inaccuracy alone suggests that the Board has substantially underestimated the cost of a Simplified-SAC case.

Moreover, testimony at the hearing indicated that the configuration of the stand-alone railroad in non-coal cases that will be the subject of the proposed Simplified-SAC procedures are *much more complex* than the operations of a unit train coal movement that have been the subject of Full-SAC cases. For example, at the hearing Witness Crowley testified that in coal cases the SARR traffic group was usually composed of 200 movements or less. Simplified-SAC cases, on the other hand, will require the inclusion of *all* traffic moving over the SARR's route. The number of individual movements will likely be in the thousands, or even the hundreds of thousands.

For example, a Simplified-SAC complaint for movement of chemicals from the Gulf Coast to the U.S. East Coast would likely travel through Houston, then over a Mississippi River gateway, and across major east-west lines to the East Coast. *All of the traffic* on that route of movement will need to be included in the SARR traffic group under the Board's proposed Simplified-SAC procedures. Under the ATC method mandated by the Board in the Ex Parte 657 case and that will be used in the proposed Simplified-SAC process, *the variable cost of each and every movement, separately for both on-SARR and off-SARR segments of the movement from*

origin to destination, will have to be calculated for each of these thousands or even hundreds of thousands of movements.

If a chemical movement from the Gulf Coast through Houston and New Orleans to the Atlanta area and beyond shared the route of movement (as it probably would) with intermodal traffic from the Los Angeles/Long Beach area through New Orleans to the East, under the Simplified-SAC process, the variable cost of every car of intermodal traffic that also uses the route of movement of the complaining traffic could have to be calculated three times, in threesegments. The first segment would be from the origin of the intermodal traffic in Los Angeles to the point where the traffic joins the route of movement of the complaining traffic. The second segment would be where the intermodal traffic traverses the route of movement of the complaining chemical traffic. And, unless the intermodal traffic terminated on the route of movement of the complaining traffic, there would often need to be a third calculation of variable cost, from the point where the carload of intermodal traffic leaves the route of movement to the point where the intermodal movement is delivered at its destination. This process would have to be repeated for every carload of traffic that uses the route of movement of the complaining traffic. Moreover, the density of each line segment also would have to be calculated, a process that adds another layer of complexity and cost.

Other evidence adduced at the hearing also supported the notion that the cost of Simplified-SAC case will be far higher than the Board's $200,000 estimate. Witness O'Connor noted that the consultant cost for even a quick, non-binding mediation – with no attorneys' fees or evidence submitted at all – was in the $50,000 range. BNSF counsel Weicher indicated that the $200,000 eligibility figure was too low.

Moreover, at the hearing, even witnesses supporting the Board's Simplified-SAC approach exhibited a great degree of uncertainty as to how much the small-case procedures will cost. BNSF counsel Weicher, for example, said that "hopefully, the smaller cases will be easier." UP counsel Rinn suggested that the cost of a Three-Benchmark case "is going to cost far more than what you think."[6] This implies that the cost of a Simplified-SAC case, which is clearly much more complex than a Three-Benchmark case, could also be much higher than the $200,000 figure assumed by the Board.

In view of the written testimony from expert witnesses in this case and the testimony of these witnesses at the hearing; the complexities of the Simplified-SAC procedure; the added complexities of non-coal movements compared to coal movements; and the huge uncertainties as to the cost of a Simplified-SAC case, if the Board decides to continue with its Simplified-SAC proposal in conjunction with the "limit to relief" proposal in its *January Decision*, the Board should use a litigation cost of $3.5 million for Simplified-SAC, which is the high end of the Interested Parties' consultant estimates.

2. The "Limit to Relief" Approach Must Be Based on a Realistic Risk Factor.

The Board's "limit to relief" proposal, in order to be workable and fair, must be based on the recognition of a realistic risk factor. Under the statutory standard of "too costly, given the value of the case," the Board is obligated to consider *cost* in relation to *value*. A rate complaint that, at best, will result in merely the return to the complainant of its investment in the case has no "value" whatsoever. Thus, to make litigation of this nature worthwhile, the value of the case has to involve a multiple of the complainant's actual costs.

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[6] In their Opening Comments, the Interested Parties estimated that the consultant costs in Three-Benchmark cases were likely to total between $115,00 to $225,000. See Interested Parties Opening Comments, Fauth V.S., p. 46.

The railroads have argued that the Board should not recognize a risk factor at all, since it allegedly would require the Board to speculate on the probability of litigation success and would allegedly insulate the complaining party from the risks of litigation. At the hearing AAR counsel repeated the railroad's opposition to a risk factor. But in the AAR's original comments in *Simplified Guidelines*, the AAR recognized that litigation costs could be a barrier to warranted rate relief, and conceded that such costs should not consume most of the potential relief. As the ICC noted in its decision in *McCarty Farms, et al, v. Burlington Northern Inc.*, in the original *Simplified Guidelines* proceeding, the AAR recognized that "the cost of presenting a case should not represent a disproportionate share of the potential rate relief." 3 I.C.C.2d at 840. In this case, however, AAR's opposition to any risk factor whatsoever would mean that the cost of presenting a case could *completely consume* the potential relief – clearly, a "disproportionate share."

Although a risk factor recognizes that litigation often is unsuccessful, in whole or in part, it does not require the Board to predict the likely degree of success in any given case. Rather, a risk factor is necessary to avoid an outcome where the value of a complainant's recovery would not justify the costs of even the most meritorious litigation. Thus, a risk factor is essential to determine whether Full-SAC is "too costly given the value of the case."

At the hearing, the Interested Parties noted that the agency already has recognized the need for a risk factor, in its 1995 decision in *Simplified* Guidelines:

> As shippers point out, a SAC presentation would not be cost-effective unless the value of the expected remedy exceeds the expected costs of obtaining the remedy by a sufficient margin to make it worthwhile to pursue the complaint. If the costs of pursuing a complaint would consume most or all of the expected recovery, then the remedy would be a hollow one for the complainant.

Simplified Guidelines, 1 S.T.B. at 1049. Since the Board itself has recognized the necessity of applying a risk factor to determine eligibility to use the current simplified rules, there are only two questions: (a) whether the Board should recognize a risk factor "up front"; and, (b) what the risk factor should be.

a. The Board's "limit to relief" approach requires the development of a risk factor as part of the eligibility standard

In its 1995 decision in *Simplified Guidelines*, the Board indicated that it would develop a risk factor on a case-by-case basis. *Simplified Guidelines*, 1 S.T.B. at 1049, n. 142. That course of action is not appropriate, and indeed is not even possible if the Board develops its "limit to relief" approach.

First of all, it is clear that if the Board's emphasis on *access* to small case procedures is to bear fruit, the Board must develop much clearer rules as to who is eligible for small-case treatment and who is not. As noted at the very beginning of these Supplemental Comments, Chairman Nottingham observed at the opening of the hearing that the purpose of the proceeding was to bring "certainty to the question of who has access." That purpose will be utterly frustrated if the Board resolves the risk factor issue on a case-by-case basis.

More to the point, if the Board's "limit to relief" approach is going to be adopted, the Board will have to develop a risk factor that will be included in the determination (along with the realistic cost of a Full-SAC and, if adopted, a Simplified-SAC case) of a limit to relief. A "limit to relief" approach is simply not workable if the Board must determine, in an individual case, what the risk factor should be in determining the shipper's limit to relief.

b. The Board should determine that a risk factor of three is reasonable

The Interested Parties previously have suggested a risk factor of three because it is clear that "a sufficient margin to make it worthwhile to pursue the complaint," as the agency stated in 1995, cannot be achieved by a risk factor margin as little as two.

An analysis of Full-SAC litigation over the past five years shows that, of the eight cases decided by the Board, six of them resulted in complete losses for the shipper, either because the complaint was dismissed in its entirety or because the decision approved the challenged rate in full.[7] Of the two cases in which the shipper obtained some relief, the measure of relief was far less than that sought by the shipper.[8] With the shipper obtaining any relief at all in only one-quarter of the Board's decisions over the last five years, and that relief much less than the shipper had sought, a risk factor of three would in fact be very conservative, since it implies full shipper success in one-third of the cases, whereas the facts show that shippers had only partial success in just one-quarter of the cases. At the hearing, Commissioner Mulvey pointed out that an analysis of cases prior to 2001 shows that shippers obtained some relief in approximately half the cases. However, it is clear that shippers did not obtain the full relief sought in many of those cases, and in any event cases that were decided ten or twenty years ago should be given much less weight in

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[7] STB Docket No. 42054, *PPL Montana, LLC v. BNSF Ry Co.*, decision served August 20, 2002 ("*PPL*"); STB Docket No. 42058, *Arizona Electric Power Coop. v. BNSF Ry., et al.*, decision served March 15, 2005; STB Docket No. 42071, *Otter Tail Power Company v. BNSF Ry. Co.*, decision served January 27, 2006 ("*OtterTail*"); STB Docket No. 42096, *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, decision served November 6, 2003 ("*Duke Energy*"); STB Docket No. 42072, *Carolina Power & Light Co. v. Norfolk Southern Ry. Col*, decision served October 20, 2004; STB Docket No. 42070, *Duke Energy Corp. v. CSX Transportation Co., Inc.* decision served February 4, 2004.

[8] STB Docket No. 42056, *Texas Municipal Power Agency v. BNSF Ry. Co.*, decision served March 24, 2003 (1-3% rate reduction approved); STB Docket N. 42057, *Public Service Company of Colorado d/b/a Xcel Energy v. BNSF Ry. Co.*, decision served June 8, 2004 (shipper achieved less than half the reduction sought).

the calculation of a reasonable risk factor than more recent decisions. Thus, a risk factor of two (implying full success in half the cases) is clearly far too low.[9]

At the hearing, AAR counsel suggested that the Board could not develop *any* risk factor because there would be no principled basis for determining any *particular* risk factor, referring to the "seven percent solution" line of cases from the late 1970s, in which the courts struck down a maximum rate standard for coal cases in which the Board prescribed a maximum rate on the basis of full costs plus seven percent, on the grounds that the seven percent additive was not explained or justified.[10]

The railroads' argument fails, for a number of reasons. First, unlike the lack of evidence and analysis in the "seven percent solution" line of cases, it *is* possible, on the basis of the analysis of results of SAC cases noted above, to develop findings based on evidence and a rationale to solidly support a reasonable risk factor of three as the basis for including a specific risk factor in a "limit of relief" eligibility standard. Second, unlike the "seven percent solution" cases, in which the ICC developed a substantive rate standard on the basis of a seven percent additive, a risk factor pertains to the procedure for accessing the agency's processes. Agencies are given wide discretion in developing procedures for conducting proceedings before them

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[9] In its *January Decision*, the Board asked the parties to comment on the Arkansas Electric Cooperative Corporation suggestion that the eligibility formula should provide for use of the Simplified-SAC up to the point where the value of the case is less than or equal to the expected SAC litigation costs of "both parties combined." The Board then modified this suggestion to ask whether a limit on relief should be set at "twice the cost for a shipper" to litigate a Full-SAC case. There are two points to be noted here. First of all, the litigation costs of "both parties combined" may not be the same as "twice the cost for a shipper." It may be that the litigation costs for a carrier have been higher than those of a shipper. The comments of some of the railroad counsel at the hearing suggests that this may be so, see for example the comments of BNSF counsel Weicher, who indicated that his railroad litigates SAC cases on the basis of the "big picture." This statement implies that BNSF considers not just the complaint before it, but the precedential value of the case for other potential litigants as well. To verify this matter, the Board would need to obtain information from the carriers as to their SAC litigation costs. Second, the Interested Parties believe, for the reasons stated above, that a risk factor of two does not, in view of the facts of SAC litigation, compensate the complainant sufficiently.

[10] See, *e.g.*, *San Antonio, TX Acting By and Through Its City Public Service Board v. United States*, 631 F.2d 831 (D.C. Cir. 1980).

EEOC v. Commercial Office Products Company, 486 U.S. 107, 125 (1998)(O'Connor, J., concurring) (deference is "particularly appropriate" where a regulation involves a "technical issue of agency procedure"). Finally, the courts have already suggested that a "risk-allocating device[]" such as recovery of a multiple of litigation costs, might be an appropriate process in cases before the Board's predecessor, the Interstate Commerce Commission. See, *Burlington Northern Railroad Company v. Interstate Commerce Commission*, 985 F2d 589, 599 (D.C. Cir. 1993) [*BN v. ICC*].

3. The Aggregation Rule Must Be Eliminated

In its *January Decision*, the Board asked whether the Board should abandon its aggregation proposal, but retain discretion to address circumstances on a case-by-case basis if the Board found that any particular complainant was disaggregating a larger dispute into a number of smaller disputes.

The Interested Parties believe that the aggregation rule should be dropped as unnecessary. In addition to the Interested Parties' comments at the hearing, a number of other parties, including the Department of Transportation, advocated elimination of the aggregation rule. The Board should simply wait to see if a problem develops, and then address it in a rulemaking or other similar proceeding, as it did with adoption of the MMM methodology in the Ex Parte 657 proceeding.

4. A "Limit to Relief" Approach Should Cap Three-Benchmark Relief At $10.5 Million Over Five Years, and Simplified-SAC Cap Relief At $13.5 Million Over Five Years.

The Interested Parties believe that the Board should use the litigation cost estimates discussed above and a litigation risk factor of three to develop a reasonable "limit to relief" approach. As noted later in these comments and in the previous written comments filed by the Interested Parties, these parties believe that the Board should withdraw its Simplified-SAC

approach. Assuming for the moment that the Board continues with its Simplified-SAC proposal, the Interested Parties believe that a "limit to relief" approach should be based on a calculation of: (a) three times the cost of a Full-SAC case to provide the limit for relief in a Simplified-SAC case; and, (b) three times the cost of a Simplified-SAC case to provide the limit for relief in a Three-Benchmark case.

Therefore, the limit for relief in a Simplified-SAC case should be $13.5 million ($4.5 million, which is the realistic cost of a Full-SAC case, times three); and the limit for relief in a Three-Benchmark case should be $10.5 million ($3.5 million, which is a realistic estimate of the cost of a Simplified-SAC case, times three).[11]

5. The "Limit to Relief" Approach Must Permit the Complainant to Revise Its Selection of Relief After a Complaint is Filed.

In its *January Decision*, the Board noted that, to address a concern raised by shippers about a lack of information, the Board could permit a complainant to amend its complaint any time up to the filing of opening evidence. Thus, if a complainant were to realize that more (or less) was at stake than originally anticipated, the complainant would not be prejudiced by electing to pursue relief under the more appropriate standard for the magnitude of the dispute.

Under the proposal in the Board's *July Decision*, a shipper will not obtain Simplified-SAC data until well after the complaint is filed. In a Three-Benchmark case, the complaining shipper will not have access to the costed Waybill Sample until after the evidence on the comparison group is filed.[12] Assuming *arguendo* the Board continues with this structure, some

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[11] At the January 31 hearing, National Grain and Feed Association, one of the Interested Parties, was asked to confirm its proposed boundaries for benchmark, Simplified-SAC, and Full-SAC cases, and NGFA stated it would do so in its February 26 filing. The Board should be advised that NGFA joins in the boundaries proposed by the Interested Parties.

[12] The issue of access to required information is further discussed in Section V.C. below.

process whereby a shipper can revise its selection of relief under a "limit to relief" structure would be necessary.

At the hearing, several railroads argued that such a process would be unfair, since a railroad defendant would have been preparing for one type of case, only to be confronted with another. Some railroads suggested that the complaint be dismissed without prejudice, permitting the shipper to re-file.

Although the Interested Parties believe that some provision should be made for the railroad defendant if the complainant amends its complaint as to the relief it seeks on the basis of information produced in the case, the Interested Parties also believe that dismissal of the complaint goes too far and is unnecessary. If a complainant revises the relief sought, the railroad should be permitted extra time to revise its own preparation, and the Board should so indicate in its decision. However, the precise time allowed would best be left to the individual case, since the added time would depend upon the type of change made (*i.e.*, whether the change is from a Three-Benchmark to a Simplified-SAC case, or vice versa, or from a Full-SAC to a Simplified-SAC case, or vice versa) and the point in the case at which a change is made (*e.g.*, at Day 21 [after the Opening Disclosure], at Day 171 [after the Second Disclosure], or at Day 249 [just before the filing of Opening Evidence] in a Simplified-SAC case, under the Board's proposed schedule).

B. The Board's Current Eligibility Thresholds Are Far Too Low.

All of the information adduced at the hearing that is summarized in Section III.A.1 above clearly indicates that the eligibility thresholds set forth in the Board's *July Decision* are utterly unrealistic. A $200,000 MVC threshold at which a complainant must file a Simplified-SAC case would mean that virtually all Simplified-SAC complainants would not even cover the direct cost

of litigating their case. Similarly, a $3.5 million threshold at which a complainant must file a Full-SAC case would mean that a large number of Full-SAC complainants would not even cover the direct cost of litigating their case.

At the hearing, Commissioner Mulvey requested information on the average railroad revenue per carload. Obviously, there are wide ranges in railroad per-car revenue by commodity. Moreover, a number of commodities are exempt from regulation, thus limiting the relevance of information for those commodities. Looking at published AAR data for two important jurisdictional commodities, chemicals and allied products and farm products, however, reveals that the average revenue per carload for these two products in 2005 was $2,802 and $2,403 per carload respectively.[13] These figures, of course, include both captive and competitive movements, so that the revenue per carload for a captive movement would be substantially higher, and clearly the figures are higher today than they were in 2005. Still, these figures strongly support the analysis contained in the Interested Parties' Opening Comments, pp. 10-11. That analysis showed that the eligibility thresholds in the Board's current proposal, even *without* taking a realistic cost of litigation or *any* risk factor whatsoever into account (in other words, using the Board's own far-understated assumptions), would limit the application of the Three-Benchmark process to movements of only a couple of cars a month, and would limit application of the Simplified-SAC process to movements of only about one car a day.

C. <u>Other Related Matters</u>.

There are three matters raised at the hearing for which brief comment is necessary.

First, a question was raised at the hearing as to whether the limits for relief that may be adopted by the Board should be indexed. The Interested Parties favor such an indexing. Even with such an indexing, however, the Board should be sensitive to the need to re-examine its

[13] "Railroad Facts 2006 Edition", pp. 25 (Carloads Originated By Commodity) and 29 (Revenue By Commodity).

limits to relief in light of actual experience. As noted above, the cost of a Full-SAC case has risen dramatically over the past ten years, far above the rate of inflation. Given the uncertainties of the Board's small-case guidelines, the Board needs to be open to the possibility that similar unexpected trends could occur.

Second, a question was raised at the hearing as to the five-year limitation on Three-Benchmark and Simplified-SAC relief. The Interested Parties are agreeable to a five-year limitation on such relief.

Finally, the Interested Parties have assumed that the Board's proposed "limit to relief" proposal would override the structure of eligibility "presumptions" set forth in the *July Decision*. The Board, if it adopts the "limit to relief" proposal set forth in its *January Decision*, should clarify in its final decision that a shipper electing to limit its relief will not be subject to eligibility presumptions. The Board must carefully avoid a process where each case becomes top-heavy with unnecessary presumption disputes that undermine the Congressional goal of simplicity.

IV. THE BOARD'S SIMPLIFIED SAC PROPOSAL SHOULD BE WITHDRAWN.

In their three rounds of Comments in this proceeding, the Interested Parties have discussed extensively why the Board's Simplified-SAC proposal should be withdrawn. See, Interested Parties Opening Comments, pp. 22-32; Interested Parties Reply Comments, pp. 12-21; Interested Parties Rebuttal Comments, pp. 30-34. We will not repeat that evidence and those arguments here. Moreover, in these Supplemental Comments, we have already summarized the huge complexities and high costs that were discussed at the January 31 hearing and which make the proposed "Simplified-SAC" process neither "simple" nor "expedited", thus frustrating the Board's desire for increased access to the agency's small case procedures. See, *infra*, pp. 15-22.

However, two points regarding the Board's Simplified-SAC proposal that were raised at the January 31 hearing or in the *January Decision* deserve additional comment: the issue of testing, and preclusion of alternate routings for issue traffic.

A. Simplified SAC Must Be Tested Before the Board Can Consider Its Use.

There was substantial discussion of the need for testing the Board's Simplified-SAC process at the hearing. In addition to the testimony of the Gerald Fauth on behalf of the Interested Parties, the Department of Transportation strongly supported testing the Simplified-SAC process against outcomes in Full-SAC cases. Indeed, some of the railroad witnesses were not opposed to testing. Counsel for NS and CSX, for example, indicated that he "lik[ed] the idea of testing."

The Interested Parties believe that, at minimum, two types of testing of Simplified-SAC are necessary. First, the Simplified-SAC process should be tested to see how closely the proposed process actually replicates a Full-SAC presentation. The Interested Parties have presented evidence showing that the Board's proposed Simplified-SAC procedure is likely to result in rates that significantly exceed those that would be produced by a Full-SAC analysis. See, Interested Parties Opening Comments, pp. 29-31, and Crowley V.S., 53-56 and Fauth V.S., pp. 24-28. Given the evident costs and complexities of Simplified-SAC, the *only* real rationale provided by the Board for Simplified-SAC is that is cheaper than Full-SAC, but still develops an answer that is reasonably related to a Full-SAC analysis. But the Board has not shown this assertion to be true, as it must. In *BN v. ICC*, the reviewing Court noted that the agency was "free to make reasonable trade-offs between the quality and cost of possible regulatory approaches." *Id.*, 985 F.2d at 597. However, the Court warned that "[r]easonableness depends on how much quality is sacrificed for how much saving in cost . . ." *Id.* Although the Court noted that the agency was entitled to deference on this point, it also made clear that deference

was not unlimited. In that case, the Court noted that the agency had "not intelligibly explained why the trade-off chosen was reasonable," *id.*, and determined that the agency had not shown that the purported trade-offs were justified, *id.* at 598-99.

Without thorough testing of Simplified-SAC against the results of Full-SAC, the Board cannot show that the purported savings in cost has been reasonably sacrificed for the purported change in the quality of the answer. Particularly in view of the evidence adduced in this proceeding that the Board's Simplified-SAC proposal will *not* produce an answer that is comparable to a Full-SAC analysis, it is necessary for the Board to subject its proposal to thorough testing, to avoid a charge that the agency has acted arbitrarily.

However, there is a second level of testing that is necessary for Simplified-SAC, in view of the particular requirements of the statute. Under Section 10701(d)(3), the Board is required to establish a "simplified and expedited method for determining the reasonableness of challenged rail rates. . . ." Unless the Board tests the Simplified-SAC process, it does not and cannot know whether the proposed process is in fact "simplified and expedited." Thus, the Board should take several examples of non-coal movements and apply the proposed Simplified-SAC procedure to them, to determine just how simple it is and just how long it will take to develop an answer. The Interested Parties believe that such an exercise also would have the salutary benefit of revealing uncertainties, gaps and problems with the procedures. It would be far better to uncover such problems now, instead of in the course of litigation when such matters will drive the cost of the procedure sky-high and extend the time for arriving at a decision that the statute requires to be expedited. [14]

[14] While testing is necessary to demonstrate that Simplified-SAC does in fact mirror CMP, such testing is not necessary for the Three-Benchmark process. The Interested Parties have noted throughout this proceeding that Congress did not require small case standards to mirror CMP. Therefore, there is no need to test the Three-Benchmark procedure to determine if its results mirror CMP. The predominant argument in favor of Simplified-

Therefore, the Interested Parties believe that the Board should withdraw its proposed Simplified-SAC process and implement the changes to the Three-Benchmark process advocated by the Interested Parties in this case. If the Board still believes that a Simplified-SAC procedure is lawful and desirable, it should test that procedure thoroughly before it proposes to utilize the procedures in smaller rate cases.

B. The Board Should Not Preclude Any Simplified SAC Analysis Based on Different Routing of the Issue Traffic

In its *January Decision*, the Board asked the parties to comment on whether the Board should preclude a complainant from developing a Simplified-SAC presentation on the basis of a routing other than the routing over which the traffic is moving. The Interested Parties believe that the Board should not preclude a Simplified-SAC analysis based upon a different route.

The Interested Parties believe that the Board has proposed to preclude a different routing because it has become evident from the railroads' Comments that the railroads cannot comply with the Board's 12-month procedural schedule for the submission of evidence in a Simplified-SAC case. The railroads' position threatens to cause – either now or in litigation – an extension of the already-extended 18-month schedule for a decision in a "simplified" proceeding that is supposed to be "expedited." One of the factors making it difficult for the railroads to comply with the procedural schedule, and particularly the Second Disclosure requirements, is the possible rerouting of the traffic on the Simplified-SARR by the complainant. See, *e.g.*, NS/CSXT Opening Comments, pp. 10-12. Thus, one "answer" to the railroads' inability to

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SAC, on the other hand, is that it *does* mirror CMP. If this is not true, however, there can be no other justification for Simplified-SAC in light of its much greater cost, complexity and time compared to the Three-Benchmark process. Even if Simplified-SAC does mirror Constrained Market Pricing, serious questions still remain as to whether Simplified-SAC satisfies Congress' mandate for a simplified and expedited procedure given the value of the case.

comply with the Board's proposed procedural schedule would be to eliminate the possibility of re-routing of the issue traffic.

But this "answer" is *precisely* the kind of "response" to the problem that was *prohibited* by the D.C. Circuit in the *BN v. ICC.* decision, at least without thorough testing. Clearly, a prohibition on the rerouting of issue traffic would eliminate the possibility of potential efficiencies on the "Simplified-SARR" by combining the issue traffic with other traffic to create greater densities, and thus lower costs. Thus, the answer produced by a prohibition on rerouting would clearly be higher than the answer that would be produced under a Full-SAC analysis. As the D.C. Circuit noted, the reasonableness of such an answer "depends on how much quality is sacrificed for how much savings in cost." *BN v. ICC,* 985 F.2d at 597. But without testing, it is *impossible* for the Board to know *how much* the quality of the answer is being sacrificed for the alleged savings in cost.

Moreover, there is good reason to believe that the results of such a prohibition on rerouting could be *fatal* to some shipper complainants. In the *July Decision*, the Board noted that the internal cross-subsidy test set forth in *PPL,* as refined in the *Otter Tail* decision, would be an affirmative defense. As the Board well knows, the *PPL/Otter Tail* cross-subsidy test tends to bar relief from shippers on lighter-density lines, since these shippers cannot show that the alleged attributable costs on a "segment" of line are not covered by the revenues attributable to the traffic on that line. The only two cases in which the cross-subsidy has been applied thus far, *PPL* and *Otter Tail*, have resulted in dismissal of the shipper's case. But if a shipper-complainant's case is likely to be dismissed because of the cross-subsidy test (non-coal shippers, being more likely located on lighter-density lines, will be particularly vulnerable to a claim under the cross-subsidy test), the only method of attempting to pass the cross-subsidy test will be to re-route the issue

traffic onto a line that contains more traffic and greater densities. If such a course is prohibited, a Simplified-SAC case will be dismissed, whereas the same analysis in a Full-SAC case might not result in dismissal. Thus, although the Board intends to apply the cross-subsidy test in a Simplified-SAC case, it would deny the complainant a key tool available to pass the test.

Finally, preclusion of an analysis based on rerouting would be particularly inappropriate given the fact that the Board's proposal already requires a shipper to develop a "Simplified-SARR" on the basis of all the traffic on a line (thus eliminating the possibility of an efficient grouping of traffic), and already requires a shipper to calculate operating and equipment expenses using URCS (thus precluding any SARR operational efficiencies). Both of these simplifications will clearly result in an answer produced by the Simplified-SAC method that is higher than the answer produced by a Full-SAC analysis. Preclusion of an analysis based upon rerouting will further tilt the playing field in favor of the railroads.

V. THE BOARD SHOULD PRESERVE THE THREE-BENCHMARK APPROACH WITH CERTAIN CHANGES.

The Three-Benchmark approach, which has been the standard for *all* small rate cases for over a decade, has been heavily criticized by the railroads throughout this proceeding. Their foremost criticism is that the Three-Benchmark process is not predicated upon Constrained Market Pricing ("CMP"). They also have raised concerns about "ratcheting," the selection of comparable traffic, and proposed changes to calculation of the RSAM and RVC benchmarks. While the Interested Parties have noted a few concerns of their own, on the whole, they support preservation of the Three-Benchmark approach for *all* small rate cases, with a few modifications.

A. The Three Benchmark Approach is Economically and Legally Defensible.

The railroads' assault on the Three-Benchmark approach as economically and legally indefensible is misguided. First, there is no legal requirement that the small case standards

comply with CMP. *See* Interested Parties' Rebuttal Comments at 3-6. Second, the Three-Benchmark approach reflects the Congressionally mandated statutory standards for rate reasonableness. *Id.* at 26-27. The railroads' reliance upon *BN. v. ICC* to the contrary is misplaced.

In *BN v. ICC*, the D.C. Circuit rejected the ICC's application of the R/VC_{Comp} benchmark as the *sole* measure of reasonableness. The court raised three concerns: ratcheting; indiscernible principles behind the selection of comparable traffic; and failure to account for revenue adequacy. *Id.* at 597. The Board had these criticisms in mind when it originally adopted the Three-Benchmark approach in *Simplified Guidelines*, 1 S.T.B. at 1011.

By adding the RSAM and $R/VC_{>180}$ benchmarks, the Board accounted for each of the statutory factors that Congress has directed it to consider in rate reasonableness determinations. *Id.* at 1020. The RSAM captured revenue adequacy and managerial efficiency, as required by Long-Cannon-1 and 2; the R/VC_{Comp} reflected demand-based differential pricing; and $R/VC_{>180}$ captured basic principles of fairness, as required by Long-Cannon-3. *Id.* While neither of these benchmarks alone was deemed sufficient by the Board, together they provided the starting point for a full analysis. *Id.* at 1013, 1020.

Similarly, the Board's revised Three-Benchmark proposal set forth in its *July Decision* employs these same factors. Although the Board has modified the RSAM and RVC calculations, those benchmarks continue to represent the same statutory factors. The ratio of those factors then are used to adjust the R/VC_{Comp} to ensure that the comparable rate reflects the revenue adequacy and differential pricing of the defendant railroad.

Once the adjusted comparable rate is calculated, however, the Board should consider other factors as warranted by individual circumstances, so long as the process remains simplified

and expedited.[15] *See* Interested Parties' Reply Comments at 23-24. Such other factors could justify a prescribed rate above or below the adjusted R/VC_{Comp} calculation. The Interested Parties advocate inclusion of the current RSAM and $R/VC_{>180}$ benchmarks among those factors. CSX/NS also expressed support for the limited consideration of other factors, including the current RSAM and $R/VC_{>180}$ benchmarks, in both their written comments and oral testimony. The Interested Parties believe that this combination of the benchmarks, based on the relevant statutory factors, along with the ability to make limited case-specific adjustments, are more than sufficient to legally support the Three-Benchmark approach.

BN v. ICC does *not* require the use of CMP in all rate cases, contrary to railroad claims. At best, *BN v. ICC* held that, on the record before the agency *in that case*, "the jettisoning of CMP/SAC cannot pass for reasoned decisionmaking." *Id.* at 599. But, the Court also noted that the agency *could* support its use of R/VC_{Comp} "by a careful analysis indicating that the incremental costs of applying CMP/SAC are large in relation to the attendant sacrifice of quality." *Id.* The Court acknowledged that the agency "is free to make reasonable trade-offs between the quality and cost of possible regulatory approaches...[which] depends on how much quality is sacrificed for how much saving in cost...." *Id.* at 597. As noted above, in that proceeding, the court concluded that the agency had "not intelligibly explained why the trade-off chosen was reasonable." *Id.*

Although *BN v. ICC* held that the Board could deviate from CMP only by a reasoned explanation, that holding did not bar Congress from mandating an alternative to CMP. In ICCTA, Congress did precisely that when it directed the Board to "complete the pending [ICC] non-coal rate guidelines proceeding to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone

[15] *One means to foster this goal would be to impose a page limit on parties' evidentiary submissions.*

cost presentation is too costly, given the value of the case." 49 U.S.C. § 10701(d)(3). At that time, Congress was well aware that the Board had proposed the Three-Benchmark approach for small cases, despite AAR claims that such an approach was deficient for failure to mirror CMP. Nevertheless, Congress did not express disapproval. Section 10701(d)(3), therefore, freed the Board to adopt a methodology other than SAC, so long as the value of the case did not justify a Full-SAC presentation. Because Three-Benchmark does consider all of the statutory factors mandated for rate reasonableness determinations, it is a fully reasonable and justified standard for small cases.

B. Ratcheting is Not A Concern Under the Three Benchmark Approach.

In its *January Decision*, the Board sought additional input on the risk of ratcheting under the Three-Benchmark approach. Specifically, the Board has invited parties to address whether the Board may use the Three-Benchmark approach, as modified by the Board's proposals, once it has exhausted all reasonable means of simplifying a SAC presentation. The answer is an unqualified "yes." There is no persuasive reason for the Board to conclude that the Three-Benchmark procedures will have any discernable and realistic ratcheting-down effect. Moreover, as discussed elsewhere by the Interested Parties throughout this proceeding, the Board is not required to first exhaust all reasonable means of simplifying a SAC presentation before it may adopt the Three-Benchmark approach. *See* Interested Parties' Rebuttal Comments at 3-6.

Although ratcheting featured prominently in the railroads' written comments, and although the Board specifically invited the parties to address the issue at the hearing, the railroads barely mentioned ratcheting in their oral testimony. This is all the more telling, because the Interested Parties explained in depth at the hearing why ratcheting is not a concern. This testimony was unrebutted. Thus, one must wonder how serious a concern ratcheting really is to the railroads.

The Interested Parties respectfully direct the Board to the oral testimony of Thomas D. Crowley at the January 31 hearing, where he explained that ratcheting-down is unlikely to occur because the comparable traffic groups are not static. In order for ratcheting to occur, a great many cases would have to be filed over a short time period concerning the same commodity and with nearly identical traffic characteristics (*e.g.* distance, geography). This seems highly unlikely, and even the AAR's counsel at the January 31 hearing testified that no one really knows how many cases might be filed. Even assuming such cases are numerous, while there may be some overlap in comparable traffic groups between some cases, substantial differences still are likely to remain that would preclude ratcheting.

If railroad rates for comparable services are rising generally from year to year, newly formed comparability traffic groups also will reflect that fact, which will counter any downward ratcheting effect. In addition, the prescribed rates under Three-Benchmark cannot have any impact at all on a comparison group if they are not captured in the waybill sample. Finally, the limited consideration of individualized factors that might warrant a higher-than-average or lower-than-average rate markup would provide further insurance against ratcheting.

The Board itself has noted that these factors, and others, make downward ratcheting an "unlikely occurrence." *Simplified Guidelines*, 1 S.T.B. at 1037. According to the Board, "downward ratcheting is a more theoretical than practical concern at this point, and is something that we could address if and when it might occur." 1 S.T.B. at 1036-37. This statement remains true today.

C. Equal Access to the Unmasked Waybill Sample is Necessary Under the Three Benchmark Approach.

The *January Decision* asks whether the need to protect confidential contract information outweighs concerns created by denying shippers access to unmasked waybill revenues, and

whether the agency's standard protective order would adequately protect such confidential data. This is another issue that the railroads glossed over in their January 31 testimony.

The undeniable fact is that unmasked waybill revenues already are revealed in SAC rate cases through the production of confidential contracts. This is even more intrusive than unmasking the waybill revenues, since far more than the revenue is revealed. Despite this fact, the production of contracts in SAC cases has become routine, subject to a standard protective order that restricts access to outside counsel and consultants. The railroads have yet to explain why this same protective order would not adequately protect the even less intrusive waybill data.

In light of these facts, fundamental fairness to shippers far outweighs any confidentiality concerns that have been raised against unmasking waybill revenues. The Interested Parties have explained this in greater detail at pages 24-26 of their Rebuttal Comments. Thus, at the very least, the Board should grant shippers access to the unmasked waybill sample immediately upon the filing of a complaint.

In addition, the Interested Parties urge the Board to grant shippers pre-complaint access to the unmasked waybill sample upon certification that a complaint is contemplated, and that the information would materially assist the shipper in determining the relief that is potentially available. This would allow shippers to evaluate the merits of a contemplated complaint with at least three potential benefits. First, it will forestall meritless complaints and give shippers serious pause to reconsider borderline complaints. Second, it will facilitate settlement of meritorious complaints, since both parties will be able to conduct a full and realistic assessment of the strengths and weaknesses of their facts and negotiate a contractual solution around the likely risks and result without ever resorting to the Board. Indeed, full access to information before the complaint will facilitate mediation, further discussed below. Third, it would allow

shippers to more accurately employ a "limit to relief" approach to eligibility as proposed by the Board, and reduce the number of revisions to the choice for relief after the complaint is filed.

At the very least, even if the Board denies pre-complaint access to the unmasked waybill sample, it should grant such access to the confidential costed waybill sample. Otherwise, shippers will have to expend a significant amount of time and money to cost individual movements in order to assess the merits of filing a small rate case, because railroad identification fields and specific location code fields are excluded from the public waybill sample. *See* Interested Parties' Rebuttal Comments, Fauth Reb. V.S. at 12-13. This entirely unnecessary effort and expense is inconsistent with a simplified and expedited process.

D. The Revised RSAM Calculation Is Appropriate

The *January Decision* invites parties to address whether the Board must continue to calculate the RSAM figure by focusing only on the revenue needed from potentially captive traffic to earn adequate revenue, rather than all traffic. The Interested Parties do not believe that the Board must choose between the two figures, but that it can and should publish both.

In their July 16, 2004 comments in Ex Parte No. 646, the Interested Parties noted a conceptual anomaly in the current RSAM calculation. *See* Interested Parties' Opening Comments, Appendix C at 13-16. Specifically, the RSAM did not necessarily measure a railroad's existing "shortfall" from revenue adequacy, because the RSAM still could indicate a substantial revenue shortfall even when the railroad was revenue-adequate under the Board's standards, if the carrier received a significant portion of its revenue from captive shippers. Indeed, the more revenue received from captive shippers, the higher the RSAM, which perversely would allow a revenue-adequate carrier to charge even higher rates to its captive shippers. This vicious spiral contradicts the CMP requirement that a railroad should only be

allowed to charge its captive traffic higher rates up to the point that it achieves revenue adequacy. In defending the current RSAM, the railroads have completely ignored this anomaly.

The Board corrected this anomaly in its modifications to the RSAM, based, however, on a different concern, namely the relationship between the RSAM and $R/VC_{>180}$. See, *July Decision* at 22-23. The Interested Parties do not agree that the Board's perceived flaw in the current RSAM in fact is a flaw. Interested Parties' Opening Comments, Fauth V.S. at 43-45. Nevertheless, the Board's modifications also rectified the anomaly identified by the Interested Parties.

Although the current RSAM calculation can produce conceptually anomalous results, that does not mean that the current RSAM must be discarded altogether. As long as the Board recognizes the limitations of the current RSAM, that figure still can be a useful tool to define the landscape of reasonableness.

The revised $RSAM_{Total}$ calculation is a reasonable and appropriate methodology to reflect revenue adequacy in the small case procedures. Under the Board's revised Three-Benchmark approach, the $RSAM_{Total}$ is not a benchmark in the true sense of the word, because it is not an independent indicator of rate reasonableness. Rather, the $RSAM_{Total}$ is the numerator in a fraction where R/VC_{Total} is the denominator. The key factor in determining the reasonable rate is the R/VCcomp, as adjusted by this fraction. Since the Board has proposed to use only the *relationship* between the $RSAM_{Total}$ and the R/VC_{Total}, it is unnecessary to limit those figures to only traffic above the 180% R/VC level.

Although the railroads all favor the current RSAM over the $RSAM_{Total}$, they are not unanimous in their rejection of the $RSAM_{Total}$. CSX/NS do not object to the $RSAM_{Total}$ and

R/VC_{Total} calculations. They merely urge the Board to also consider the current benchmarks. This is nearly the same position as the Interested Parties have taken in this proceeding.

E. Traffic Other Than That of the Defendant Railroad Should Not Be Automatically Excluded

The *January Decision* invites parties to address the railroads' position that the Board should exclude non-defendant movements from the comparable traffic group. The Interested Parties believe that a *per se* exclusion of non-defendant movements is unnecessary, undesirable, and arbitrary.

In many instances, traffic on non-defendant railroads in fact may be more comparable to other movements of the same commodity on the defendant railroad. For example, if a shipper challenges a BNSF rate for grain across North Dakota and Minnesota, similar grain movements by Canadian Pacific in this same region could be more comparable than other BNSF grain movements across other parts of the country. Similarly, UP chemical traffic that originates on the Gulf Coast could be more comparable to market-dominant chemical traffic that originates on another railroad on the Gulf Coast than it is with other UP chemical traffic that originates elsewhere on the UP's system.

Therefore, the exclusion of non-defendant traffic is best adjudicated on a case-by-case basis. The burden should be on the railroad to prove that non-defendant traffic is not in fact comparable.

F. Contract Traffic Should Not Be Automatically Excluded

There also is no justification for the *per se* exclusion of contract traffic from comparison groups. The Board itself clearly did not contemplate the exclusion of contract traffic, because its own proposal in its *July Decision* provided for unmasking waybill revenues after the selection of the final comparison group. But, there would be no need to unmask revenue if contract traffic

were excluded. The railroads have not presented any compelling reason to now exclude contract traffic.

At pages 22-24 of their Rebuttal Comments, the Interested Parties presented a host of reasons as to why it would be inappropriate to impose a blanket exclusion upon contract traffic. The railroads themselves rarely distinguish between a contract and tariff. To the extent railroads are willing to enter into contracts in today's market, those contracts often resemble tariffs in their terms and conditions, and they typically incorporate tariffs wholesale into the contract terms. It is extremely rare for a contract to contain any service commitments that would distinguish it *from common carrier service.*

The Interested Parties' comments were confirmed and expanded upon by the testimony of The Dow Chemical Company at the hearing, and in letters filed in the record by BASF, Cargill, and ChevronPhillips Chemical Company. For example, Dow noted that, although chemical industry contracts may have multi-year terms, those typically are Master Contracts that do not contain any rates. The rates are negotiated in Lane Appendices that typically have one year terms. This allows railroads to adjust contract rates frequently, just as they adjust their tariffs.

The comparability of contract traffic should be considered on a case-by-case basis. While contract traffic, in certain circumstances, may not be truly comparable, the presumption should be that such traffic is comparable and the burden should be on the railroad to prove otherwise.

G. The Board Should Use Unadjusted URCS

The railroads would complicate the Three-Benchmark process unnecessarily through URCS adjustments, a theme that they continued to press at the January 31 hearing. The Board's proposal to use unadjusted URCS is a compromise to achieve simplification in small rate cases. Once the Board opens the door to some URCS adjustments by the railroads, however, there is no

rational basis to preclude other offsetting adjustments by shippers. As the Board noted in *BP Amoco Chemical Co. v. Norfolk Southern Ry.*, Docket 42093 (served June 6, 2005), *citing BN v. ICC*, 895 F. 2d at 601, "if the adjustments were made on both sides, it might well be pointless; if on only one side, it would create phony discrepancies."

The Interested Parties have expounded in greater detail on the problems with URCS adjustments at pages 25-30 of their Reply Comments. They note first of all several adjustments that could benefit shippers, as evidence that the adjustment process necessarily is a two-way street. Then, they question the propriety of several specific URCS adjustments that the railroads have proposed, and they note many complex issues that would have to be litigated to determine if the proposed adjustments would be warranted in each case. Once the Board heads down that slippery slope, it cannot turn back.

The Board's decision to use unadjusted URCS is reasonable. Most small case traffic is going to be much closer to unadjusted URCS than is large case traffic, such as coal, for which the Board already has adopted unadjusted URCS in Ex Parte 657. Thus, there is no justification to allow URCS adjustments in small cases that are supposed to be simplified, but not to allow them in more complex SAC cases.

The prohibition against URCS adjustments need not be unduly prejudicial to one side or the other. There may be situations where the railroads incur additional costs that might be considered in setting the prescribed rate. There also may be situations where shippers can demonstrate that the issue traffic moves more efficiently, and thus at less cost, than the comparable traffic. The Interested Parties contemplate that such evidence from both sides can be submitted in the latter stages of a Three-Benchmark case, after computation of the R/VCcomp, as

adjusted by the $RSAM_{Total}$ and R/VC_{Totals} to demonstrate that the issue rate should be higher or lower than the R/VC_{Comp} rate.

In the final analysis, the Board should draw a distinction between URCS adjustments, which should be proscribed, and the consideration of non-URCS related factors, which should be considered within reasonable limits. The railroads confuse these points, and in the process they would unduly complicate the Three-Benchmark approach.

VI. MANDATORY MEDIATION IS ACCEPTABLE, AS LONG AS CERTAIN CONDITIONS ARE MET.

In the *January Decision*, the Board asked the parties to address whether the Board should adopt the suggestion for a 20-day mandatory, non-binding mediation period at the commencement of any case.

The Interested Parties would support the imposition of a non-binding, mandatory mediation requirement, as long as the mediation period would extend for no longer than 20 days. (A fifteen-day mediation period would also be acceptable, and the shorter time would in some ways be more desirable). The Board will need to insure that staff members who are involved in the mandatory mediation process are not involved in the decision making process if the dispute continues before the Board. Finally, a standard confidentiality requirement should be imposed, with nothing in the mediation able to be used in any subsequent litigation either before the Board or otherwise.

VII. CONCLUSION.

The Interested Parties appreciate the opportunity to submit these Supplemental Comments, and respectfully request the Board to adopt the proposals set forth herein and in the Interested Parties Opening, Reply and Rebuttal Comments in this proceeding.

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Dated: February 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have on this 26th day of February, 2007, served a copy of the foregoing Comments on all parties of record, by first-class mail, postage prepaid.

Aimee DePew